No. 13,692

IN THE

United States Court of Appeals

For the Ninth Circuit

DAVID DON SCHUMAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

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JURISDICTION.

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Northern District of California, Southern Division. (10-11)[1]

The District Court made no findings of fact or conclusions of law. No opinion of the Court was rendered. The Court merely found the appellant guilty as charged in the indictment. (155) Title 18, Section 3231, United States Code, confers jurisdiction in the

[1]Numbers appearing herein within parentheses refer to pages of the printed transcript of record filed herein.

District Court over the prosecution of this case. The indictment charged an offense against the laws of the United States. (3-4) This Court has jurisdiction of this appeal under Rule 37(a)(1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed within the time and in the manner required by law. (11-12)

STATUTES AND REGULATIONS INVOLVED.

The indictment was returned pursuant to the provisions of Section 12(a) of Public Law 759, 80th Congress, Second Session (50 U. S. C. 462(a), 62 Stat. 622).

Section 6(g) of Public Law 759, 80th Congress, Second Session, reads as follows:

> (g) Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools. or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled, shall be exempt from training and service (but not from registration) under this title. (50 U. S. C. 456(g), 62 Stat. 609)

Section 16(g) (1), (2), (3) reads as follows:

> (g)(1) The term "duly ordained minister of religion" means a person who has been ordained,

in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

(2) The term "regular minister of religion" means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

(3) The term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization. (50 U. S. C. 466(g) (1), (2), (3), 62 Stat. 624)

Section 1622.19 of the Selective Service Regulations provides:

> § 1622.19 *Class IV-D: Minister of religion or divinity student.* (a) In Class IV-D shall be placed any registrant:
>
> (1) Who is a regular minister of religion;
>
> (2) Who is a duly ordained minister of religion;
>
> (3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or
>
> (4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been preenrolled. (32 C. F. R. 797)

Section 1624.2 of the Selective Service Regulations reads as follows:

> § 1624.2 *Appearance before local board.* (a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the "Minutes of Actions of Local Board and Appeal Board" on the Classification Questionnaire (SSS Form No. 100).
>
> (b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have

been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary. (32 C. F. R. 802)

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified.

Section 1626.25 of the Selective Service Regulations reads as follows:

§ 1626.25 *Special provisions when appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and

by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than Class I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class IV-E. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class IV-E, but does find that the registrant is eligible for classi-

fication in Class IV-E, it shall place him in that class.

(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class IV-E or in Class IV-E, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice. * * *

(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred in Class IV-E. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

STATEMENT OF THE CASE.

The indictment charged the appellant with a violation of Section 12(a), Universal Military Training and Service Act, 50 U. S. C. App. 462(a). It was

alleged that after registration and classification, defendant was required to report for induction and that he did report for induction and "did on or about the 28th day of August, 1952, in the City and County of San Francisco, State and Northern District of California, knowingly refuse to submit himself to induction and be inducted into the armed forces of the United States as provided in the said Selective Service Act of 1948, and the rules and regulations made pursuant thereto". (4) The appellant was arraigned. (5) He pleaded not guilty. (5-6) Trial by jury was waived and he consented to trial to the court. (6) The case was called for trial on October 17, 1952. (7) Evidence was received (16-101) (126-156) and the cause taken under submission and continued until October 21, 1952. (7-8) On October 21, 1952 the trial was again continued for further testimony to October 24, 1952. (8) A motion for judgment of acquittal was made at the close of the evidence. (101 to 112) There appears to be no ruling on the motion in the record, however, the defendant was found guilty. (155) The Court sentenced the appellant to eighteen months in the custody of the Attorney General. (10-11) Judgment and commitment were entered in the Court below, in accordance therewith. Notice of appeal was duly and timely served. (11) Application was made for bail in the trial Court pending appeal (115-116) which was granted. (12-13-14) The transcript of the record, including Statement Of Points Relied On, has been filed. (159-160-161)

FACTS.

Appellant registered in the time and in the manner required by law with Local Board No. 40 of San Francisco (Government's Exh. 1), on September 17, 1948. He filed his Classification Questionnaire on September 1, 1949. (Government's Exh. 2) As indicated in the questionnaire, appellant was attending City College of San Francisco, engaged in a premedical course. On August 14, 1950, appellant directed a letter to the local board, advising that in November of 1949 he began his study of the Bible with one of Jehovah's Witnesses and has since that time continually devoted his time to the study of the Bible. That he was enrolled in the Theocratic Ministry School where he learned how to give public lectures and conduct Bible studies. He further states that he is engaged in conducting Bible studies and was devoting all of his time to the vocation of ministry, and in view of the facts set forth in the letter, requested a classification of IV-E (now changed to I-O under the regulations). (Government's Exh. 3) Attached to this letter was a letter from Edwin Soderlund, Company Servant, certifying that the appellant was a duly ordained minister according to the standards of the Watchtower Bible and Tract Society, a recognized religious organization. (Government's Exh. 4) No response was had to the letter from the appellant to the board and it then appears on the Minutes of Actions of Local Board and Appeal Board, attached to the questionnaire, marked Government Exh. 2, that on October 19, 1950 appellant was classified I-A by

a vote of three to nothing. On November 3, 1950, Form 110 was mailed to registrant notifying him of his classification as I-A. On November 9, 1950, appellant directed a letter to Local Board 40, requesting a personal hearing on the grounds that he was an ordained minister and entitled to a classification of IV-D. (Government's Exh. 5) Personal hearing was had on November 30, 1950 and a summary made. (Government's Exh. 6) Thereafter, on December 30, 1950, Form 110 was mailed notifying appellant of the continuation of Class I-A, and appellant was ordered to report for physical. Thereafter, on January 22, 1951 a letter was directed to the local board protesting the classification of I-A given to appellant and directing the board's attention to the reasons as set forth therein why a classification of IV-D as a minister should be given, and setting forth that the appellant regularly and customarily performs the duties of a minister. (Government's Exh. 7) Thereafter, on April 4, 1951 a letter was directed to the local board requesting a reconsideration of appellant's classification, on the ground that appellant was a minister devoting his full time to his calling and stating that his primary vocation is as a minister. Attached to the letter were a number of verified statements and documents attesting to the fact that the appellant is a duly ordained minister, setting forth the work that he does, setting forth the fact that he is considered as a regular and acting minister by the congregation and was performing duties as such, and including a certification from the Watchtower Bible and Tract

Society verifying the fact that he was a duly ordained minister, and also including a statement signed by sixty-two members of the congregation attesting to the fact that they had been present when he had acted as such minister. This letter, together with the accompanying verified statements and documents, appears as one exhibit (Government's Exh. 8). On March 29, 1951 the appellant directed a letter to the State Director of Selective Service and an identical letter to the National Director of Selective Service, pointing out that the local board had given him a classification of I-A but that in truth and in fact he was an ordained minister acting as such, and should be classified IV-D; that he had filed extensive documents signed and verified by representatives of the Watchtower Bible and Tract Society and other members of his religious group and he requested that steps be taken to correct this classification. (Government's Exh. 9) Government's Exhibit 10 is a card issued by the Watchtower Bible and Tract Society attesting to the fact that the appellant was a duly ordained minister of Jehovah's Witnesses. Thereafter, on July 2, 1951 appellant filed a conscientious objector form (Government's Exh. 11), claiming exemption from both combatant and noncombatant training and service by virtue of his religious training and beliefs. In this form it is alleged that the appellant's belief is that there is a Supreme Being above all the earth, and that he has revealed knowledge about himself through the Bible. This belief involves duties that are set down in the Bible, which duties to God supersede any

duties to man. Acts 5:29. This form indicates that appellant's study of the Bible has continued since 1949; that the appellant is a public speaker on Bible subjects and on Tuesdays he preaches door to door; on Wednesdays and Thursday, he conducts Bible studies in people's homes; on Fridays he attends a ministry school and service meetings where he is an instructor speaker. On Sundays he attends Bible lectures and Bible studies. He alleges he made a public consecration and was immersed at a circuit assembly of Jehovah's Witnesses in 1950. He was consecrated on September 3, 1950 at the Scottish Rite auditorium and he was immersed September 3, 1950 at Crystal Plunge. Attached to the form is a statement that the appellant's mother became one of Jehovah's Witnesses in 1946 and from that time on appellant and his mother had many discussions about the Bible, and it was largely due to her efforts that he began his studies.

On July 25, 1951 the District Coordinator of the Selective Service System advised Local Board 40 that the appellant had been registered in the wrong local board, namely, Board No. 40, and should have been registered in Board No. 38, and Board No. 40 was requested to transfer his file to Local Board No. 38, and that Local Board No. 38 continue the processing of the registrant as though he were a late registrant. (Government's Exh. 12) On July 28, 1951, Local Board No. 40 advised the appellant that upon reviewing his record, the correct draft board was 38 rather

than 40 and his file was therefore being forwarded to Board No. 38.

There then appears on the Minutes of Actions by Local Board, attached to Government's Exhibit 2, a note that appellant was classified I-A on September 11, 1951 and that on September 12, 1951 form 110 giving notice of classification was mailed to the appellant. On September 19, 1951, appellant requested a personal appearance before Local Board 38 for the purpose of showing that he was an ordained minister, who is conscientiously opposed to all forms of combatant or noncombatant service in the armed forces. He requested permission to bring an attorney and several witnesses who would testify as to the truthfulness of the foregoing (Government's Exh. 15). On September 24, 1951 local board 38 advised the appellant that under the provisions of the Act he could not bring an attorney or witnesses to testify on his behalf, and could appear on October 1, 1951 but must be unaccompanied (Government's Exh. 16). His personal appearance was then set over to October 8, 1951. Thereafter, on the Minutes of Actions there appears the notation "10/8/51 classified I-A continued—after personal appearance before board—request as an ordained minister and request as a conscientious objector denied". At the time of the personal appearance two affidavits were filed, one by the presiding minister of Jehovah's Witnesses, San Francisco Mission Unit, attesting to the fact that David Schuman, appellant here, is an associated and active minister in

the Mission District Congregation of Jehovah's Witnesses and is enrolled in the Theocratic Ministry School at the local headquarters and that appellant has been found qualified to serve as a presiding minister in one of the regular conducted Bible study groups within the local congregation's territory. A second affidavit by an instructor of the Theocratic Ministry school of the Mission Unit of Jehovah's Witnesses, attests to the fact that appellant is recognized by his school record to be a minister capable of preparing and delivering public Bible lectures, which has been proven by receiving and carrying out given assignments or lectures. (Government's Exh. 17.)

An alleged stenographic transcript of the personal appearance before members of the local board 38 was made after the October 8, 1951 appearance. (Government's Exh. 18.) It appears that the appellant brought a Court reporter with him to take notes on the hearing but the members of the board declined to permit this to be done. The transcript indicates that appellant requested classification as a minister, stating that he was ordained by the Watchtower Society; that his training had been at the Mission Unit of the Theocratic Ministry School of Jehovah's Witnesses. Appellant stated that he did no secular work and that he had given up his pre-med studies because they interfered with his religious work; that he dedicated his life to serve God on September 3, 1950; that appellant is qualified to perform marriages and

speak at funerals and he is now devoting his life to his vocation of preaching. The statement is made in the transcript on page 7 thereof by one of the board as follows: "Your veracity of your faith is unquestionable". The personal appearance also covered the question of conscientious objection raised, and it was stated by the appellant that he was requesting the classification on both grounds of being a minister and as a conscientious objector to all forms of service. There then follows as a summary that "primary vocation is student. Continued in I-A. Request denied for classification as ordained minister and conscientious objector."

On October 17, 1951, a notice of appeal of classification I-A was given to local board 38. In this notice there is also contained a statement that appellant was preparing a letter to the board of appeals that would show the inaccuracies in the summary of his personal appearance. (Government's Exh. 19.) On October 23, 1951 the inaccuracies appearing in the summary were set forth by the appellant. (Government's Exh. 20.) On April 15, 1952 there was a hearing before the Department of Justice and a report made by the hearing officer. (Government's Exh. 27.) In the statement of facts appearing in the hearing officer's report, it is indicated that the mother of the appellant was a Jehovah's Witness for ten years and his father was Jewish; that the registrant devotes considerable time to his religious practices and he wants to spend his life in the propagation of the faith of Jehovah's

Witnesses; that he first started to study the Bible under the supervision of the Jehovah's Witnesses in 1949. In conclusion, the hearing officer stated as follows:

> "The Hearing Officer wishes to emphasize that the registrant became actively identified with the Jehovah Witnesses in 1949 and although, apparently, sincere in his religious beliefs, he has not been identified with the faith a sufficient length of time to convince the undersigned that he is entitled to exemption from military duty."

It was then accordingly recommended that his appeal be not sustained and that he be classified I-A.

On July 24, 1952, the Department of Justice directed a letter to the chairman of the Appeal Board advising them that after examination and review of the file, the Department of Justice found "that the conscientious objections of the above named registrant are not sustained on the ground that he has failed to establish that such alleged objections are based upon deep-seated conscientious convictions arising out of religious training and belief." It was therefore recommended that the Appeal Board refuse to reclassify the appellant. (Government's Exh. 28.)

At the trial a draft board member before whom the personal hearing was had, testified as follows:

> "Q. Now, will you tell us what the basis of your vote was finding that the registrant was not a conscientious objector?
>
> Mr. Karesh. To which we object as incompetent, irrelevant and immaterial. Furthermore,

we say that the action of the Appeal Board superseded the action of the local board and the decisions are in this Circuit as to the latter proposition cannot be disputed, and I have the language from the decision. No matter what the basis of the decision was—let us do it in reverse. One, no matter what the basis of the decision was, it is immaterial, you can't explore his mind and go to his reason. Two, the action of the Appeal Board superseded the action of the local board.

The Court. Objection overruled. Let him answer.

Mr. Brill. I think the Court has ordered you to answer the question.

The Witness. Well, the Board, in deciding his case, felt that he was not a student minister, that he was not a regular ordained minister, and as such his file revealed he was going to school and on that basis felt not being an ordained minister and not a full-time student of a recognized theological seminary with a full course of instruction, he had no basis on his conscientious objector." Transcript of record pages 130-131.

"The Witness. Well, the Board, in considering his case, felt that he was not a full time minister as a vocation. He was probably, as an avocation, acting as a minister.

Q. (By Mr. Brill.) You say he was acting as a minister as an avocation?

A. Well, part time, or maybe some duties, some lectures, something like that, but not a full-time minister as a vocation.

Q. Now, because of the fact that he was not spending his full time as a minister I assume that is what you are telling us?

A. That's right.

Q. Now, what was the basis upon which they found that he was not a conscientious objector?

Mr. Karesh. Your Honor, we renew our objection. The file speaks for itself. We can't go into the mental processes of this person here, said he had no prejudice against the registrant——

Mr. Brill. Just a moment, he hasn't said any such thing. That question wasn't asked.

Mr. Karesh. I thought it was asked.

The Court. According to the testimony, it was part of his testimony, that is all. Overruled. Let him answer. What was the question?

Q. (By Mr. Brill.) The basis upon which you found that he was not a conscientious objector?

A. Well, feeling that he was not a full-time minister——

The Court. You can be a conscientious objector without being a minister.

The Witness. Yes.

Mr. Brill. Your Honor, I am going to object to the Court's advising the witness. I think the witness should be allowed to answer the question.

The Court. All right. I think you are correct. Go ahead and answer the question.

The Witness. The Board felt that not being a full-time, acting full minister, full vocation, and considering that he is just giving lectures and his file indicating that he was a student up until a certain period, that there was no basis for his conscientious objection."

(Trans. pages 142-144.)

At the trial demand was made for the production of the F.B.I. report upon which the Hearing Officer relied but the trial Court refused to order it produced. (Trans. page 70.)

QUESTIONS INVOLVED AND HOW RAISED.

1. Was the classification of I-A instead of IV-D made by the local board after the personal appearance before it, supported by any basis in fact?

2. Was the classification of I-A instead of I-O (conscientious objector) made by the local board after the personal hearing, without basis in fact?

3. Is the recommendation of the Hearing Officer, appointed by the Department of Justice, against appellant's claim for conscientious objector classification, without basis in fact, arbitrary and capricious and in excess of the jurisdiction of such Hearing Officer under the Regulations?

4. Is the recommendation of the Department of Justice against, and the action of the Appeal Board, denying appellant's claim for conscientious objector classification without basis in fact, arbitrary and capricious, and made by virtue of an erroneous interpretation of the Universal Training and Service Act with reference to conscientious objections?

5. Was the refusal of the trial Court in requiring the Government to produce at the trial the secret F.B.I. report used by the Hearing Officer appointed by the Department of Justice, a denial of due process?

SPECIFICATION OF ERRORS.

The trial court erred in:

(1) Denying appellant's motion for judgment of acquittal.

(2) Failing to hold that the classification by the local board of I-A instead of either IV-D or I-O was without basis in fact and arbitrary and capricious.

(3) Failing to hold that the Hearing Officer designated by the Department of Justice denied the claim of appellant for classification as a conscientious objector on artificial and illegal standards and beyond the jurisdiction set forth in the Regulations.

(4) Failing to hold that the Department of Justices recommendation denying appellant a conscientious objector status and the subsequent action by the Appeal Board in reliance thereon, were without basis in fact, arbitrary and capricious, and based upon an artificial and illegal standard.

(5) Failing to require the Department of Justice to produce the secret F.B.I. report which was used by the Hearing Officer in making his recommendation against defendant, thereby denying to defendant his right to be confronted by and cross-examine witnesses against him.

SUMMARY OF ARGUMENT.

Point One.

The local draft board had no basis in fact for the denial of the claim made by appellant for exemption as a minister of religion, and arbitrarily and capriciously classified him in I-A.

Section 16 (g) (1) of the Selective Service Act of 1948 defines the term "ordained minister". Section 16 (g)(2) defines the term "regular minister". These provisions of the act state that a person who pursues the ministry as his customary vocation is entitled to exemption. Section 16 (g)(3) provides that one who does not regularly, as a vocation, preach the principles of religion, but who irregularly or incidentally preaches, is not a minister.

Cox v. United States, 157 F. 2d 787 (C. A. 9th), affirmed 332 U. S. 442, rehearing denied 333 U. S. 830, does not control here. That case held that persons who pursued the ministry incidentally to secular work were not entitled to claim the ministerial exemption. This case is governed by *Hull v. Stalter,* 151 F. 2d 633 (C. A. 7th).

It was the responsibility of the local board and the board of appeal to classify the appellant according to his status at the time of his personal appearance before the local board. On that date he was pursuing the ministry as his vocation and was not preaching part-time or incidentally to a secular vocation. The undisputed evidence and facts brought the appellant within

the definition of a minister of religion. There was no evidence to dispute any of the proofs submitted that he was a minister of religion. The finding that he was not a minister flies in the teeth of the evidence and is unlawful. It is without basis in fact. It was the duty of the trial court to grant the motion for judgment of acquittal and discharge the appellant. *Hull v. Stalter,* 151 F. 2d 633 (C. A. 7th); *Arpaia v. Alexander,* 68 F. Supp. 880 (Conn.).

Point Two.

The local board had no basis in fact for the denial of the claim made by appellant for exemption as a conscientious objector opposed to both combatant and noncombatant training, and arbitrarily and capriciously classified him I-A.

A reading of the transcript of the personal hearing before the local board (Government's Exh. 18) will show that nothing appeared therein from which the local board could find that the appellant was not opposed to all forms of military training and service by reason of his religious beliefs. The Board member who conducted the hearing stated: "Your veracity of your faith is unquestioned." The only other board member present gave as his reason why the appellant was not entitled to a conscientious objector classification, the following, appearing at page 131 of the Transcript of Testimony:

> "Well, the Board, in deciding his case, felt that he was not a student minister, that he was not a

regular ordained minister, and as such his file revealed he was going to school and on that basis felt not being an ordained minister and not a full-time student of a recognized theological seminary with a full course of instruction, he had no basis on his conscientious objector."

and again on page 144 of the Transcript:

"The Board felt that not being a full time, acting full minister, full vocation, and considering that he is just giving lectures and his file indicating that he was a student up until a certain period, that there was no basis for his conscientious objection."

Point Three.

The recommendation of the Hearing Officer appointed by the Department of Justice against appellant's claim for conscientious objector was without basis in fact and contrary to his own findings.

The report of the Hearing Officer states that appellant "devotes considerable time to his religious practices and wants to spend his life in the propagation of the faith of Jehovah Witnesses"; that he "became actively identified with the Jehovah Witnesses in 1949 and although, apparently, sincere in his religious beliefs, he has not been identified with the faith a sufficient length of time" * * * to entitle him to exemption.

The Regulations (Section 1626.25 (c)) limit the inquiry to character and good faith of conscientious ob-

jections and since the Hearing Officer found the appellant was sincere, his refusal to recommend such classification was arbitrary and capricious and without basis in fact.

Point Four.

The recommendation of the Department of Justice acted upon by the appeal board, denying appellant a classification as a conscientious objector was based upon artificial and illegal standards and in violation of the Selective Service Act and Regulations.

The recommendation of the Department of Justice (Government's Exh. 28) sets the standard of conscientious objections as "based upon deep-seated conscientious convictions arising out of religious training and belief" while Section 1622.20 of the Regulations provides that the registrant must be found to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces, and Section 6 (j) of Title 1 of the Selective Service Act of 1948 provides in part that religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views, or a merely personal moral code. Nothing appears making it dependent upon duration of such convictions for any set length of time.

Point Five.

The Hearing Officer and the trial Court unlawfully denied the defendant the right to be confronted with the witnesses against him whose names and identities were kept secret in the F.B.I. report furnished to the Hearing Officer and used by him in making his determination.

ARGUMENT.

POINT ONE.

THE LOCAL DRAFT BOARD HAD NO BASIS IN FACT FOR THE DENIAL OF THE CLAIM MADE BY APPELLANT FOR EXEMPTION AS A MINISTER OF RELIGION, AND ARBITRARILY AND CAPRICIOUSLY CLASSIFIED HIM IN I-A.

Section 16 (g)(1) of the act provides that an ordained minister is one who has been ordained according to the discipline of a religious organization to preach and teach the doctrines of such church. The undisputed evidence shows that the appellant was ordained at the time he made his appearance before the local board in October 1951. In order to claim the benefits of the exemption to an ordained minister the section of the act also provides that the minister must preach as his "regular and customary vocation". Section 16 (g)(3) provides that the term minister does not include one who irregularly or incidentally preaches. The record in this case shows that the appellant pursued the ministry prior to his personal appearance, at the time of his personal appearance and subsequent to his personal appearance as his voca-

tion. There was no evidence whatever before the board or before the court below that he preached irregularly or incidentally to some secular vocation. The undisputed evidence shows that he was engaged in the ministry as a full-time missionary and presiding minister of a congregation of Christian people. It establishes that he preached from the pulpit several times weekly in addition to devoting more than one hundred hours per month to missionary work in the field.

The undisputed facts show that appellant was preaching his religion as an ordained minister of the gospel, which was his vocation rather than his avocation. A vocation is defined by Webster's *New International Dictionary of the English Language,* 2nd Edition, Unabridged, 1950, on page 2854 as follows:

> Vocation (L. *Vocatio* a bidding, a calling, invitation, fr. *vocare* to call; cf. F. vocation. 1. A calling; a summons; a call; specif.: a. *obs.* Convocation, as of an assembly. b. A calling to a particular state, business, or profession. 2. Regular or appropriate employment; calling; occupation; profession; as, to change one's *vocation.* 3. The members of a particular calling or profession, collectively. *Rare.* 4. *Theol.* a. A calling to the service of God in a particular station or state of life, esp. in the priesthood or religious life, as shown by one's fitness, natural inclinations, and, often, by conviction of a Divine invitation. b. The station or state of life to which one receives such a calling. c. An official invitation to a particular ecclesiastical office, as a pastorate.
>
> Syn.—vocation, avocation, hobby. Vocation denotes one's regular calling or profession; an Av-

> ocation is something which calls one away from one's ordinary pursuits; the word commonly suggests a subsidiary or minor occupation, and its employment in the sense of *vocation* is contrary to good usage. * * * A Hobby is a favorite avocation; the word often connotes a mildly indulgent attitude towards what is regarded as extreme. * * * See OCCUPATION.

There is no question but that appellant, a full-time minister, was a regular and duly ordained minister of religion as defined in Section 6(g) and Section 16(g) (1), (2), (3) of the act. He did not irregularly or incidentally teach and preach the doctrines and principles of Jehovah's Witnesses. He regularly, as a vocation, taught and preached the principles of religion and administered the ordinances of public worship as embodied in the creed or principles of the church known as Jehovah's Witnesses. His preaching work was his customary vocation.

The incidental attendance at a Public School prior thereto by appellant does not disqualify him to be classified as a regular or ordained minister of religion. The term "regular minister" used in the regulations has been defined to be one who regularly teaches and preaches. It has been held that the fact that a minister of religion may be performing secular work during the week to support himself and rendering his ministerial services gratuitously did not prevent him from being a regular minister of religion, because he preached regularly each week, and was therefore a regular minister of religion. *Ex parte Cain,* 39 Ala. 440-441.

It is to be observed that the regulations use the word "customarily". Customary, the word from which it is derived, is synonymous with "usual" and "habitual". It does not mean continuously. It is not synonymous with continuously, uninterruptedly, daily, hourly, or momentarily. The *Century Dictionary* defines "customarily" to mean "in a customary manner; commonly; habitually". Therefore the use of the words "regular" and "customarily" implies that Congress intended to give the term "minister of religion" the same broad scope which it has included throughout the history of freedom of worship in this country.

From time immemorial the work of a preacher or minister has not been confined to speaking from a pulpit to a congregation that is capable of supporting the minister financially so as to make it unnecessary for him to depend on other sources for support and maintenance. In fact, ministers more often than not, especially in the rural sections, have been forced to work on farms, in grocery stores and at other secular work during six days of the week in order to support themselves and their families, so that they might regularly and customarily preach on Sunday. It is a part of the custom of this country that preaching is done regularly when done on Sunday. As long as a minister preaches regularly on Sunday and at night times during the week he is regularly and customarily preaching. If he regularly and customarily preaches during the week he is a regular minister of religion under the act and regulations. The source of his income is wholly immaterial. Whether his congregation is able

to provide him with an income sufficient to maintain him is immaterial. Whether he is fortunate in being rich and able to maintain himself from stocks, bonds, securities and property investments is not material. Whether the regular minister, like most ministers, is not financially independent, but has to depend on his labors for his support, is also immaterial. Time spent in attending to investments from which an income is derived, or to labor in secular callings, is also immaterial in determining whether or not the minister regularly and customarily preaches.

Throughout history of religious organizations ministers have been distinguished from church-sustained clergy. The self-supporting ministers contributed much more than the orthodox clergy to the spread of religion along with the pioneers in the days of expansion to the West.

> "Although made the special work of certain representative disciples, it is, in fact, enjoined upon the Church as a whole, and upon its members in particular, 'as of the ability which God giveth' (1 Pet. 4:10-11) * * * From these scriptural examples, it is just to infer that lay preaching, in the various forms of teaching, evangelizing, and prophesying, had from the first a double object: 1, to do good to all men; and, 2, to develop and prove the gifts of those who from time to time were called from the ranks of the laity to the more public ministry of the Word. Such, doubtless, continued to be the practice of the Church during the early centuries, and it was only by degrees that it became modified under the hierarchial

> spirit which became developed at a later period * * * In the Reformed churches there was a general breaking away from the trammels of ecclesiasticism, together with an energy of purpose which did not scruple to employ any agencies at its command for the dissemination of truth. * * * The first formal and greatly effective organization of lay preaching as a system, and as a recognized branch of Church effort, took place under John Wesley at an early period of that great religious movement known as the revival of the 18th century." *Cyclopedia of Biblical, Theological, and Ecclesiastical Literature,* McClintock and Strong, New York, Harper & Bros., 1880.

The English Court of Appeal held that the conscription law of that country, passed during the first world war, should be given an interpretation so as to include a part-time minister of unorthodox Strict Baptist Church. (*Offord v. Hiscock,* 86 L.J.K.B. 941.) In that case the person held to be a minister was a solicitor's clerk during six days of the week. He was invited to preach on one occasion and it appeared that he was satisfactory, so he was engaged as the minister. In that case Viscount Reading said: "I have come to the conclusion that there is an absence of any evidence from which the Justices could draw the conclusion that he had not brought himself within the exception to the statute enforcing military service. In my view it is clear that he had determined to devote himself to the ministry."

Under the Canadian National Selective Service Mobilization Regulations the Supreme Court of Sas-

katchewan held that a registrant was entitled to exemption from all training and service as a minister of religion. (*Bien v. Cooke,* 1944, 1 W.W.R. 237.) There the minister spent, in farming, six days of each week. All that was required was that he satisfy the general secretary, who was a railroad engineer, that he believed the New Testament, and that he meet the necessary moral requirements.

The United States Court of Appeals for the Second Circuit, in *Trainin v. Cain,* 144 F. 2d 944, said that the regular performance of secular employment was not incompatible with the claim for exemption as a regular minister of religion: "While the two positions are not mutually exclusive, and a validly draft-exempt minister of religion could still maintain a legal practice on the side, the existence of the latter can be taken into consideration in determining whether registrant is in fact a regularly practicing minister."

The mere fact that a poor preacher of a financially weak congregation is required to perform secular work during the week to support himself in the ministry does not bar him from claiming the exemption as a minister of religion as long as he regularly and customarily teaches and preaches the doctrines and principles of a recognized religious organization. In determining whether or not there is basis in fact for a draft board determination denying a claim for exemption or deferment under the act such action cannot be supported solely by a finding that such person had other activities on the side that would not, within

themselves, entitle such person to exemption or deferment. If the facts establish that such person comes within the exemption or deferment granted under the act, incidental activities not entitling him to exemption or deferment are wholly irrelevant and immaterial.

The pages of history abound with proof that even ministers of orthodox denominations perform secular work during the week in order to sustain themselves in their ministry. Today some denominations have no paid clergy at all. Every minister in some denominations is required to perform secular work, although he may regularly and customarily teach and preach the doctrines and principles of his church as a minister. "Upon this point a page of history is worth a volume of logic."—Mr. Justice Holmes, *N. Y. Trust Company v. Eisner,* 256 U.S. 345, 349.

The liberal construction placed upon the act so as not to confine exemption solely to the orthodox clergy is demonstrated by the fact that officers of the Salvation Army, Lay Brothers of the Catholic Church, the practitioners, readers and lecturers of Christian Science in the Church of Christ Scientist, cantors in the Jewish congregation, counselors of the Mormon Church, and colporteurs of the Seventh-day Adventist Church were all declared by General Hershey to be exempt under the Selective Training and Service Act of 1940.

A narrow, restrictive and orthodox determination would also exclude entirely those persons above mentioned who were included within the exemption by the

Director. A construction of the act so as to exclude Jehovah's Witnesses discriminates against them without cause, justice or reason.

Since neither the act nor the regulations exclude dissentient groups, they cannot be construed to exclude unorthodox ministers. It must be assumed that the act and regulations were intended to embrace within the exemption the ministers of all denominations, whether popular or unpopular, orthodox or unorthodox. Any other view would require us to impute to Congress the intention of discriminating between religious denominations and ministers according to nebulous or arbitrary standards, with resultant inequitable, crotchety application of the statute.

A realistic approach to the construction of an act providing for benefits to religious organizations requires that boards make "no distinction between one religion and another. * * * Neither does the court, in this respect, make any distinction between one sect and another." (Sir John Romilly in *Thornton v. Howe,* 31 Beavin 14.) The theory of treating all religious organizations on the same basis before the law is well stated in *Watson v. Jones,* 80 U. S. (13 Wall.) 679, 728, thus:

> "The full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

It must be assumed that Congress, when it provided for ministers of religion to be exempt from all training and service, intended to adopt the generous policy above expressed so as to extend to all ministers of all religious organizations.

The method of teaching and preaching employed by appellant and Jehovah's Witnesses is primitive. That is to say, they use the original method of preaching instituted by Jehovah's Great Witness, Christ Jesus. He and his apostles preached publicly and from house to house. (Acts 20:20.) Every true Christian minister of the gospel is commanded to follow in their footsteps and must do likewise. (1 Peter 2:21; Luke 24:48; Acts 1:8; 10:39-42.) Since Jehovah's Witnesses take the message to the people their preaching is distinguishable from that of the religious clergy, who require people to come to them and sit at their feet to be preached to.

Jehovah's Witnesses do not confine their preaching to church buildings. Experience and statistics prove that not all people can be reached in that manner because they will not all come to such buildings.

More than 70,000,000 people in the United States do not belong to any religious organization. Many other millions do not attend any church, although they nominally belong to one of the religious organizations. These nonchurchgoers are not heathen. The preaching activity of Jehovah's Witnesses reaches not only these millions of persons who depend almost entirely upon Jehovah's Witnesses to bring them spiritual food, but

in addition their preaching activity from door to door reaches millions of people who belong to religious organizations who "sigh and cry because of the abominations" committed therein (Ezekiel 9:4; Isaiah 61:1-3.) Jehovah's Witnesses have answered the need of these people by bringing them printed sermons at their homes, which meets their convenience. It is just as important to have primitive ministers and evangelists going from door to door to maintain the morale of these millions as it is to preserve the morale of those who attend some orthodox religious organization's church services. How would these persons who do not attend any church be comforted in their sorrow and obtain some spiritual sustenance unless some missionary evangelist brought it to them at their homes? Few, if any, of the orthodox religious clergy call upon the people from door to door. They have their established congregations. They expect the people to come to their church edifices to receive what instruction they have to offer. Accordingly, these millions of persons would starve for want of spiritual food were it not for Jehovah's Witnesses who bring Bible instruction to them in their homes. Thus Jehovah's Witnesses locate the people of good-will toward Almighty God. If they desire further aid in the study of the Bible Jehovah's Witnesses establish Bible studies in their homes. In this way Jehovah's Witnesses educate the people in the way of life and point them to the avenue of escape from the greatest crisis yet known.

Jehovah's Witnesses are an international group of missionary evangelists who get their name from Al-

mighty God, whose name alone is Jehovah. (Psalms 83:18; Isaiah 43:10-12.) Their preaching duties are to call from door to door, preaching and presenting Bibles and Bible literature explaining about God's kingdom described in the Bible as the only hope of the world. The whole earth is divided into countries or branches, each branch is divided into districts, each district is divided into circuits, each circuit is divided into areas, each area is assigned to one or more missionary evangelists of Jehovah's Witnesses. The ones assigned to each area have a duty to preach from door to door in that area. Persons interested are called back on, for the purpose of establishing regular home Bible studies, which are conducted for a year or more. This is done in order that all such persons may get a complete understanding of the things that the Bible clearly teaches concerning God's kingdom and their relationship to Jehovah and His kingdom by Christ Jesus.

In addition to this method of preaching Jehovah's Witnesses also preach on the street corners by distributing Bible literature. They also deliver public lectures and sermons in various buildings engaged by them for that purpose. Primarily the congregations of Jehovah's Witnesses are in the homes of the people. Their pulpits may well be said to be at the doorstep of the home of every person of good-will throughout the nation.

It is not necessary to know theology, philosophy, art, science and ancient classic languages to preach

the gospel. One is not required to wear a distinctive garb, live in a parsonage, ride in an expensive automobile, have a costly edifice in which to preach, and command a high salary, to qualify as a minister of God. Jehovah's Witnesses emulate their Leader, Christ Jesus, and His apostles, rather than the ancient or modern scribes and Pharisees. Instead of a program of choir and organ music followed by discourse on science and philosophy of men, Jehovah's Witnesses devote all their time to studying and teaching the Bible and carrying God's message to the people at their homes. They are ministers in the real and true sense and serve all the people. Paul, the apostle, said that the true minister teaches publicly and from house to house. (Acts 20:20; Luke 22:24-27.) It is written that Christ Jesus "went around about the villages, teaching" and "preaching the gospel of the kingdom". (Mark 6:6; Matthew 9:35; Luke 8:1.) The apostle Peter advises each minister of Jehovah God: "For even hereunto were ye called: because Christ also suffered for us, leaving us an example, that ye should follow his steps." (1 Peter 2:21.) Jesus expressly commanded His twelve ordained ministers to go from house to house: "And as ye go, preach, saying, The kingdom of heaven is at hand." (Matthew 10:7, 10-14.) In the four Gospel accounts of the ministry of Jesus, the words "house" and "home" appear more than 130 times, and in the majority of those times it is in connection with the preaching activity of Jesus, the great Exemplar. His example of carrying the gospel message to the people at their homes and in the public

ways was "true worship". He said: "But the hour cometh, and now is, when the true worshippers shall worship the Father in spirit and in truth: for the Father seeketh such to worship him. God is a Spirit: and they that worship him must worship him in spirit and in truth." (John 4:23, 24.) His apostle James further describes such worship by ministers of Almighty God at James 1:27, "For the worship that is pure and holy before God the Father is this: to visit the fatherless and the widows in their affliction, and that one keep himself unspotted from the world." (*Syriac New Testament, Murdock's Translation.*)

Books and booklets are used by appellant and Jehovah's Witnesses in their preaching work for the convenience of the people. Such publications contain the truths of the Bible in a permanent form for study by the interested person at his convenience. Today such persons cannot afford to have the minister stay with them hours and days at a time, as was customary centuries ago or in less recent years. Literature used by Jehovah's Witnesses is a substitute for the oral sermon or Bible discourse that is available to only the few. The literature is not printed and distributed selfishly for commercial gain or to achieve a large volume of profits. Indeed the literature is offered on a contribution basis. Persons unable to donate toward the work but who are interested may have the literature free or upon such terms as they desire to receive it. (1 Corinthians 9:11-14.) Contributions received when the literature is distributed are used to help defray cost of publishing and distributing more like litera-

ture. Any deficit is taken care of by Jehovah's Witnesses.

The method of preaching employed by Jehovah's Witnesses is by making house-to-house calls, and regularly delivering public sermons, preaching in the schools and congregations of Jehovah's Witnesses, conducting home Bible studies, preaching on the streets and distributing literature containing explanation of Bible prophecies. It has been argued that Jehovah's Witnesses are mere distributors of books. It is asserted that they are colporteurs and no more. It is said then that by reason of this status they are not entitled to claim the benefit of the exemption contained in the act. It boils down to the argument that Jehovah's Witnesses, although a religious organization, are not entitled to have their ministers protected by law, even though the protection is extended to the ministers of all other denominations. This is grossly inconsistent with the former Selective Service policy with reference to other religious organizations which are engaged solely in the business of distributing books. For instance, the colporteurs of the Seventh-Day Adventist organization are not ministers in the sacerdotal sense.

Seventh-Day Adventist colporteurs are mere "Gospel workers" whose qualifications are claimed to be equal in standing with those who preach the gospel. (White, *The Colporteur Evangelis,* Mountain View, Calif., 1930.) They are not ordained as are Jehovah's Witnesses. They merely sell books. They do not conduct home Bible studies. They do not make revisits;

they do not preach before congregations; they do not conduct baptismal ceremonies; they do not participate in the burial of the dead; they do not perform other ceremonies, all of which are performed by Jehovah's Witnesses, as will be hereinafter shown. Nevertheless the liberal policy of the Government was extended so as to permit these colporteurs of the Seventh-Day Adventist organization to be classified as ministers of religion exempt from all training and service.

In allowing the colporteurs to be classified as ministers no stringent requirement was invoked for the consideration of their classification as is invoked in the consideration of the claim for exemption by Jehovah's Witnesses. Compare the requirements: State Director Advice 213-B issued by General Hershey, in determining the ministerial status of these Seventh-Day Adventist colporteurs, among other things, says that "even though they are not ordained" they are entitled to be classified as ministers of religion when any such colporteur is "found to be actually engaged in a *bona fide* manner in full-time work of this nature and files evidence of possession of a colporteur's license or a colporteur's credentials".

Jehovah's Witnesses are more than colporteurs. They preach and teach, in addition to merely distributing literature.

The term "regular minister of religion" as used in the Selective Training and Service Act of 1940 was given a very broad definition by the National Director of the Selective Service System insofar as it

applied to most religious organizations and their ministers. "The principle was extended to persons who were not, in any strict sense, ministers or priests in any sacerdotal sense. It included Christian Brothers, who are religious, who live in communities apart from the world and devote themselves exclusively to religious teaching; Lutheran lay teachers, who also dedicate themselves to teaching, including religion; to the Jehovah's Witnesses, who sell their religious books, and thus extend the Word. It includes lay brothers in Catholic religious orders, and many other groups who dedicate their lives to the spread of their religion." *Selective Service in Wartime,* Second Report of the Director of Selective Service 1941-42, Government Printing Office, 1943, p. 241.

The Director of Selective Service did not confine the preaching and teaching to oral sermons from the pulpit or platform. He said that such is not the test. "Preaching and teaching have neither locational nor vocal limitations. The method of transmission of knowledge does not determine its value or effect its purpose or goal. One may shout his message 'from housetops' or write it 'upon tablets of stone.' He may give his 'sermon on the mount,' heal the eyes of the blind, write upon the sands while a Magdalene kneels, wash disciples' feet or die upon the Cross. He may carry his message with the gentleness of a Father Damien to the bedside of the leper, or hurl inkwells at the devil with all the crusading vigor of a Luther. But if in saying the word or doing the thing which gives expression to the principle of religion, he conveys to

those who 'have ears to hear' and 'eyes to see', the concept of those principles, he both preaches and teaches. He may walk the streets in daily converse with those about him telling them of those ideals that are the foundation of his religious conviction, or he may transmit his message on the written or printed page, but he is none the less the minister of religion if such method has been adopted by him as the effective means of inculcating in the minds and hearts of men the principles of religion.

"But to be a 'regular minister' of religion he must have dedicated himself to his task to the extent that his time and energies are devoted to it to the substantial exclusion of other activities and interests." *Selective Service in Wartime,* pp. 240-241.

Appellant is ordained; therefore he is an ordained minister of religion within the meaning of the act and regulations. The Director of Selective Service declared that while ordination in many of the large orthodox denominations is accompanied by elaborate ceremonies, in many other organizations, including the dissentients and unorthodox groups "it is the simplest of ceremonies or acts without any preliminary serious or prolonged theological training. The determinations of this status by the Selective Service System have been generous in the extreme." *Selective Service in Wartime,* Second Report of the Director of Selective Service 1941-42, p. 240.

It has been held that the term "ordained minister", as used in the statute licensing ministers to solemnize

marriage ceremonies, "has no regard to any particular form of administering the rite or any special form of ceremony. * * * It has been the practice of this Court therefore, to grant the license to authorize the solemnization of marriages to duly commissioned officers in the Salvation Army who are engaged under such authority in ministering in religious affairs; to all Protestant ministers, Catholic priests, Jewish rabbis, teachers and ministers of spiritualistic philosophy, and in fact all persons who can prove to the satisfaction of the Court that they have been duly appointed or recognized in the manner required by the regulations of their respective denominations, and are devoting themselves generally to the work of officiating and ministering in the religious interest and affairs of such societies or bodies." *In re Reinhart,* 9 Ohio Dec. 441, 445.

This same broad and liberal interpretation of the term "ordained minister" as it relates to exemption of a minister of a religious denomination under the National Selective Service Mobilization Regulations of Canada has been considered by Mr. Justice McLean of the Supreme Court of Saskatchewan in the case of *Bien v. Cooke,* 1944, 1 W.W.R. 237. In that case he said: "Although the whole congregation is very indefinite considered from a secular point of view and they appear to be without any prescribed procedure in the matter of ordaining the minister, yet various denominations use various forms of ordination and if the procedure is satisfactory to the

congregation, as appears to be in this instance, that should be considered sufficient form of ordination."

The ministry is not confined to adult persons or to the aged. Youths not only are permitted to preach, but are invited to do so. (Joel 2:28, 29; Psalms 148:12, 13) Children of Jehovah's Witnesses are reared in the nurture and admonition of the Lord, being trained for the ministry at a very early age. After being thoroughly schooled, they may enter the ministry, if they so desire, although yet children or youths. Ancient outstanding examples are Samuel, Jeremiah and Timothy, whose faithfulness as Jehovah's Witnesses in very early youth is proof of the propriety of children's acting as ministers. (1 Samuel 1:24; 2:11; 3:1; Jeremiah 1:4-7) Paul the apostle declares that he sent Timothy forth as a minister. (1 Corinthians 4:17) Timothy was instructed by Paul to let none despise his youthfulness.—1 Timothy 4:12.

The youthfulness of appellant does not affect his qualifications for the ministry. If he is old enough to be taken into the armed forces and assume such responsibilities he is old enough to be a minister. Preaching at an early age is not unusual to followers of Christ. His parents reared him "in the nurture and admonition of the Lord" and put him into the "temple service" or preaching at an early age, as required by Jehovah and as commanded in His statutes recorded at Deuteronomy 6:4-7. See Ephesians 6:1-4: "Children, obey your parents in the Lord: for this is right. Honour thy father and mother;

which is the first commandment with promise; that it may be well with thee, and thou mayest live long on the earth. And, ye fathers, provoke not your children to wrath: but bring them up in the nurture and admonition of the Lord." See also Ecclesiastes 12:1; Psalms 71:17; Genesis 18:19.

Christ Jesus, when but twelve years of age, was already about his "Father's business", discussing the Scriptures. (Luke 2:46-49) When preaching the gospel later on, He said: "Suffer little children to come unto Me, and forbid them not: for of such is the kingdom of God." (Luke 18:16; see also Matthew 18:1-6) Psalms 8:2: "Out of the mouths of babes and sucklings hast Thou ordained strength"; Psalms 148: 12, 13: "Both young men, and maidens; old men, and children: let them praise the name of the Lord: for His name alone is excellent; His glory is above the earth and heaven."—Proverbs 8:32.

Regardless of the age at which appellant began his ministry, there is nothing to show that he was disqualified to act as a minister of Almighty God at the time of his classification, and, as a minister, he is entitled to complete exemption.

Cox v. United States, 157 F. 2d 787 (C. A. 9th), affirmed 332 U. S. 442, rehearing denied 333 U. S. 830, and *Martin v. United States*, 190 F. 2d 775 (C.A. 4th), do not apply here. The reason is that in each of those cases the appellant devoted a large and substantial part of his time to performance of secular work at the time of final classification. In this case

the evidence shows that the appellant did not perform any secular work. The evidence showed without dispute that he pursued the ministerial work as his vocation and that he did not perform the ministry incidentally as did the appellants in the *Cox* and *Martin* cases, *supra.* The facts in this case are brought squarely within the rule announced by the Court in *Hull v. Stalter,* 151 F. 2d 633 (C.A. 7th). In that case the registrant was a full-time pioneer minister for the Watchtower Bible and Tract Society, which is the same as the appellant in this case. The rule applied in the *Hull* case ought to apply here.

The undisputed record that the various draft boards had before them before the induction date showed that the appellant was a duly ordained minister, having been ordained "in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization." (Section 16(g)(1) of the Selective Service Act of 1948.)

The language of the Court of Appeals for the Seventh Circuit in *Hull v. Stalter,* 151 F. 2d 633, is

appropriate. In that case, involving an arbitrary classification of one of Jehovah's Witnesses on facts similar to the facts in this case, the Court said: "The fact is, they have been recognized as a religious organization and are entitled to the same treatment as the members of any other religious organization. * * * In our view, every registrant, whether he be Jehovah's Witness or otherwise, is entitled to have his status determined according to the facts of his individual case. Also, a registrant's classification should be determined by the realities of the situation, not merely by what he professes. A registrant is not entitled to exemption merely because he professes to be a minister, but he is entitled to such exemption if his work brings him within that classification."

The same liberal interpretation that was placed upon the act and regulations and as construed and applied by the Court of Appeals for the Seventh Circuit should be adopted by this Court and applied to the facts in this case so as to reach the same conclusion as was reached by that court in *Hull v. Stalter,* 151 F. 2d 633. That Court said:

> "* * * In our view, every registrant, whether he be Jehovah's Witness or otherwise, is entitled to have his status determined according to the facts of his individual case. Also, a registrant's classification should be determined by the realities of the situation, not merely by what he professes. A registrant is not entitled to exemption merely because he professes to be a minister, but he is entitled to such exemption if his work brings him within that classification.

"Selective Service Regulations (622.44) recognize two classes of ministers, (1) a regular minister of religion, and (2) a duly ordained minister of religion. The former 'is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member * * *.' The latter 'is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church * * *.' The Selective Service System has even more broadly defined the term 'regular minister of religion.' Under the heading, 'Special Problems of Classification' (Selective Service in Wartime, Second Report of the Director of Selective Service, 1941-42, pages 239-241), it is stated: 'The ordinary concept of "preaching and teaching" is that it must be oral and from the pulpit or platform. Such is not the test. Preaching and teaching have neither locational nor vocal limitations. The method of transmission of knowledge does not determine its value or affect its purpose or its goal. One may preach or teach from the pulpit, from the curbstone, in the fields, or at the residential fronts. He may shout his message "from housetops" or write it "upon tablets of stone". He may give his "sermon on the mount", heal the eyes of the blind, write upon the sands while a Magdalene kneels, wash disciples' feet or die upon the cross. * * * He may walk the streets in daily converse with those about him telling them of those ideals that are the foundation of his religious conviction, or he may transmit his message on the written or printed page, but he is none the less the minister of religion if such

> method has been adopted by him as the effective means of inculcating in the minds and hearts of men the principles of religion. * * * To be a "regular minister" of religion the translation of religious principles into the lives of his fellows must be the dominating factor in his own life, and must have that continuity of purpose and action that renders other purposes and actions relatively unimportant.' "

The determination by the draft boards that the appellant was not a minister within the meaning of the act and regulations was arbitrary and capricious. The determination ought to be upset by this Court on the authority of *Niznik v. United States*, 184 F. 2d 972 (C.A. 6th) (opinion on the second appeal). In that case the Court said:

> "Although the members of the draft board performed long, laborious, and patriotic duties, nevertheless, their ruling in this regard, that appellants were not entitled to classification as ministers of religion, was based not upon the evidence or information in appellants' files, or upon a belief in the truthfulness of the statements made by appellants, but upon the fact that they were members of Jehovah's witnesses. * * *
>
> Disregard of this provision, and refusal to classify as a minister of religion solely on the ground that appellants were members of a religious sect and that they had not attended a religious seminary and had been regularly ordained, was arbitrary and contrary to the law and regulations. 'In classifying a registrant there shall be no discrimination for or against him because

> of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice.' Section 623.1 (c) of the Selective Service Regulations."

It was the responsibility of the local board to classify the appellant on October 8, 1951 according to the facts as they existed when he appeared before the local board on that date. In *Hull v. Stalter,* 151 F. 2d 633 (C.A. 7th), the Court held that each registrant was entitled to be classified as of the time of the final classification rather than as of the time of registration or the filing of the questionnaire. The Court said:

> "We see no reason why a registrant with a non-exempt status at the time of registration should not subsequently be permitted to show that his status has changed or, conversely, why one who is exempt at the time of registration should not afterwards be shown to be non-exempt. In fact, the latter situation seems to be contemplated by §5 (h) of the Act, which provides that 'no * * * exemption or deferment * * * shall continue after the cause therefor ceases to exist.' The point perhaps is better illustrated by referring to certain officials who are deferred from military service while holding office. Suppose a registrant who held no office at the time of his registration and was therefore liable for military service should subsequently be elected or appointed judge of a court or any other office mentioned in the Act. We suppose it would not be seriously contended but that he would be per-

> mitted to show his changed status any time prior to his induction into service and therefore be entitled to deferment. And we see no reason why a registrant claiming to be exempt as a minister should not be classified according to his status at the time of his final classification rather than that at the time of registration."

The evidence submitted to the board by the appellant in this case was not discredited or impeached by the local board or the Government in the Court below. The documentary evidence was accepted as true by the local board and the only bases for the denial of the IV-D classification were the arbitrary and capricious grounds stated by the board upon appellant's personal appearance. In the *Cox* case there was an issue of fact before the local board. In the case at bar there is no issue of fact and the fact situation is drawn clearly within that involved in *Niznik v. United States*, 184 F. 2d 972 (C.A. 6th). There is, moreover, no basis in fact for the determination and the rule stated in *Estep v. United States,* 327 U.S. 114, about no basis in fact applies. The attention of the Court is drawn to the opinion of Mr. Justice Douglas, joined in by Mr. Justice Black, in *Cox v. United States,* 332 U.S. 442, where it was said:

> "It is not disputed that Jehovah's Witnesses constitute a religious sect or organization. We have, moreover, recognized that its door-to-door evangelism is as much religious activity as 'worship in the churches and preaching from the pulpits.' *Murdock v. Pennsylvania,* 319 U.S. 105. The Selective Service files of these petitioners establish, I think, their status as ministers * * *

"To deny these claimants their statutory exemption is to disregard these facts or to adopt a definition of minister which contracts the classification by Congress.

"* * * It is not uncommon for ordained ministers of more orthodox religions to work a full day in secular occupations, especially in rural communities. They are nonetheless ministers. Their status is determined not by the hours devoted to their parish but by their position as teachers of their faith. It should be no different when a religious organization such as Jehovah's Witnesses has part-time ministers. Financial needs may require that they devote a substantial portion of their time to lay occupations."

The attention of the Court is called also to the opinion of Mr. Justice Murphy in the *Cox* case, where he said:

"It is needless to add that, from my point of view, the proof in these cases falls far short of justifying the conviction of the petitioners. There is no suggestion in the record that they were other than bona fide ministers. And the mere fact that they spent less than full time in ministerial activities affords no reasonable basis for implying a non-ministerial status. Congress must have intended to exempt from statutory duties those ministers who are forced to labor at secular jobs to earn a living as well as those who preach to more opulent congregations. Any other view would ascribe to Congress an intention to discriminate among religious denominations and ministers on the basis of wealth and necessity for secular work, an intention that I am unwilling to impute. Accordingly, in the absence of

more convincing evidence, I cannot agree that the draft board classifications underlying petitioners' convictions are valid."

The decision in *Cox v. United States,* 332 U.S. 442, and the decision in *Goff v. United States,* 135 F. 2d 610 (C.A. 4th), have been made inapplicable by reason of the explicit Congressional definition of a minister in Section 16 of the Selective Service Act of 1948.

It is plain that the vocation and calling of the appellant is his ministry. This was his status on the occasion of his hearing before the local board. He cannot be denied his ministerial classification because theretofore he may not have been a minister or did not become a full-time minister until September 3, 1950. The situation in that respect in this case is the same as that involved in *Hull v. Stalter,* 151 F. 2d 633 (C.A. 7th).

POINT TWO.

THE LOCAL BOARD HAD NO BASIS IN FACT FOR THE DENIAL OF THE CLAIM MADE BY APPELLANT FOR EXEMPTION AS A CONSCIENTIOUS OBJECTOR OPPOSED TO BOTH COMBATANT AND NONCOMBATANT TRAINING, AND ARBITRARILY AND CAPRICIOUSLY CLASSIFIED HIM I-A.

It has been held repeatedly that a determination of the proper classification must be made by reference to the facts appearing in the draft board file.

"Consequently when a court finds a basis in the file for the board's action that action is conclusive."

Cox v. U. S., 332 U.S. 442.

A review of the file in the instant action fails to disclose any fact which could in any way disqualify the appellant from classification as a conscientious objector, independent of the question of his ministerial status. On the contrary, the file and the record disclose that the local board determined that appellant was not a conscientious objector upon the sole ground that he was not an ordained minister and had not attended a recognized theological seminary with a full course of instruction. (Tr. pp. 131-144.)

Appellant had the right to show the basis upon which the draft board acted in order to show there was no basis in fact.

> "As we understand it, at his trial he may call the members of the board and may himself take the stand; he may testify as to what he told them, and he may cross-examine them as to their motives, and in general as to the basis of their finding."
>
> *U. S. ex rel., Kulick v. Kennedy,* 157 Fed. 2d 811 (C.A. 2nd).

The cases are uniform that the appellant is entitled to due process which includes a fair hearing by the local board within the purview of the Selective Service Act.

This Court held in the recent case of *Knox v. U. S.* (C.A. 9th) Number 13,166, decided December 4, 1952, as follows:

> "Classification by the local board is an indispensable step in the process of induction. The registrant is entitled to have his claims considered and

acted upon by these local bodies the membership of which is composed of residents of his own community. An underlying concept of the Selective Service System is that those subject to call for service in the armed forces are to be classified by their neighbors—people who are in a position to know best their backgrounds, their situation and activities.

But, it is suggested, a presumption of regularity or of the due performance of duty attends official action; and it should be presumed in this instance not only that the local board considered the claims of the registrant, but that in light of them it took action to continue in effect his original I-A classification. We think the court may not indulge the presumption, at least in the latter respect, in the condition of the record in the case."

The requirement of due process should certainly prevent the members of the local board from disregarding entirely the Regulations applicable to defining conscientious objectors, and allowing them to arbitrarily and capriciously set illegal and false standards by which the determination is to be made as to who is a conscientious objector.

The Selective Service Act and Regulations set up the standards to be used and the basis for determination.

Section 6(j) of Title I of the Selective Service Act of 1948 provides in part as follows:

"Religious training and belief in this connection means an individual's belief in a relation to a

> Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."
>
> 32 *C.F.R.* 797.

Appellant's belief and objections against combatant and noncombatant service are based on his "relation to a Supreme Being involving duties superior to those arising from any human relation". The file shows that his belief is not based on "political, sociological, or philosophical views or a merely personal moral code". There is nothing whatever in the file to dispute appellant's claim. The findings of the local board are subject to attack when the board arbitrarily deprives the registrant of a hearing in accordance with the requirements of due process. *Poole v. U. S.*, 159 Fed. 2d 312 (C.A. 4th); *Niznik v. U. S.*, 173 Fed. 2d 328 (C.A. 6th).

POINT THREE.

THE RECOMMENDATION OF THE HEARING OFFICER APPOINTED BY THE DEPARTMENT OF JUSTICE AGAINST APPELLANT'S CLAIM FOR CONSCIENTIOUS OBJECTOR WAS WITHOUT BASIS IN FACT AND CONTRARY TO HIS OWN FINDINGS.

Section 1626.25 of the regulations provides as follows:

> "Section 1626.25. *Special provisions when appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question whether or not a registrant is entitled

to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action: * * *

(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred in Class IV-E. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained."

The Regulations define the scope of the inquiry to be made by the Hearing Officer for the Department of Justice as being "an inquiry and hearing on the character and good faith of the conscientious objections of the registrant." Such a hearing was had. (Government's Exh. 27.) The hearing was had on April 15, 1952, and by the facts found by the Hearing Officer, it was found that the appellant first started studying the Bible under the supervision of the Jehovah's Witnesses in 1949, however, his mother, with whom appellant lived, had been an ardent Jehovah's Witness for the past ten years. It was

further found that "registrant devotes considerable time to his religious practices and wants to spend his life in the propagation of the faith of the Jehovah Witnesses." Nothing appears that would be derogatory in any manner or inconsistent with the finding in April of 1952 that the appellant was opposed to both combatant and noncombatant military training and service. The conclusion of the Hearing Officer again emphasizes "the registrant became identified with the Jehovah Witnesses in 1949 and although, apparently, sincere in his religious beliefs, he has not been identified with the faith a sufficient length of time to convince the undersigned that he is entitled to exemption from military duty." This in effect is a conclusion reached by the Hearing Officer that appellant was sincere in his religious beliefs and the only ground upon which his claim was denied was the fact that he had only been a Jehovah's Witness approximately three years. To uphold the validity of the findings made by the Hearing Officer would be in effect to add a provision to the Regulations that not only must the appellant be in good faith in his conscientious objections, but he must also have had conscientious objections for a period longer than three years. This, obviously, was not the intention of Congress in enacting the Selective Service Act or Regulations thereunder.

The Circuit Court of Appeals for the Seventh Circuit has held that the registrant must be classified according to his status as it was found at the time of his final classification, rather than at the time of

registration or any other time. (*U. S. ex rel., Floyd Hull v. John Stalter,* 151 Fed. 2d 633.) If, as was the case here, the Hearing Officer found that the appellant was in good faith in making his conscientious objections, he was under a duty to recommend that such objections be sustained. In holding that appellant had not been a member of the Jehovah's Witnesses long enough, and placing his denial of such objections on this ground, was clearly an abuse of discretion and beyond the express jurisdiction given him under the Regulations.

> "Thus it is error reviewable by the courts when it appears that the proceedings conducted by such boards 'have been without or in excess of their jurisdiction, or have been so manifestly unfair as to prevent a fair investigation, or that there has been a manifest abuse of the discretion with which they are invested under the act.'"
>
> *U. S. ex rel. Trainin v. Cain,* 144 F. 2d 944, 947.

POINT FOUR.

THE RECOMMENDATION OF THE DEPARTMENT OF JUSTICE, ACTED UPON BY THE APPEAL BOARD, DENYING APPELLANT A CLASSIFICATION AS A CONSCIENTIOUS OBJECTOR WAS BASED UPON ARTIFICIAL AND ILLEGAL STANDARDS AND IN VIOLATION OF THE SELECTIVE SERVICE ACT AND REGULATIONS.

The Department of Justice, in its letter to the Appeal Board, denied appellant his right to classification as a conscientious objector on the ground that such objections were not "based upon deep-seated conscientious convictions arising out of religious

training and belief". (Government's Exh. 28), Section 6(j) of Title I of the Selective Service Act of 1948 sets forth the standards by which religious training and belief in connection with such conscientious objections shall be determined, and in this regard, sets forth that it means "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." Nothing appears making it dependent upon duration for any set length of time. The Department of Justice in this case attempted to read into the Regulations an artificial standard not called for by the Regulations. It is obvious that a person can be as conscientious in his convictions even though they were drawn from religious training which extended over a period of only two or three years, as they could be if the religious training extended for a period of ten years. It is obvious that the only search and inquiry is directed to the person's beliefs and sincerity of such beliefs, without relation to the length of time the believer has held such beliefs.

It must be remembered that the Department of Justice did not question the sincerity or present beliefs of the appellant nor does anything appear in the file or in the Hearing Officer's report which in any way would impugn the sincerity of the appellant.

By the addition of the artificial standards not called for by the Regulations, and in violation of the Regu-

lations the action of the Department of Justice and the Appeal Board was arbitrary and capricious and in violation of the Selective Service Act and Regulations, and in excess of the jurisdiction expressly given the Department of Justice and the Appeal Board and made without basis in fact.

POINT FIVE.

THE HEARING OFFICER AND THE TRIAL COURT UNLAWFULLY DENIED THE DEFENDANT THE RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM WHOSE NAMES AND IDENTITIES WERE KEPT SECRET IN THE F.B.I. REPORT FURNISHED TO THE HEARING OFFICER AND USED BY HIM IN MAKING HIS DETERMINATION.

This point was raised in the trial Court on the motion for acquittal (Trans. pages 108-109), and in the statement of points relied on for appeal. (Trans. page 161.)

Since the trial of the within action, the Supreme Court of the United States decided the cases of *U. S. v. Nugent,* No. 540 and *U. S. v. Packer,* No. 573, and by a five to three decision held in effect that the registrants were not entitled to have the F.B.I. reports introduced in evidence at the trial. The writer has just been informed that the Supreme Court has granted the right to file a petition for rehearing of the *Nugent* and *Packer* cases, and it is for this reason this point is raised here. It is desired to preserve this point pending a possible rehearing and change in the Supreme Court's determination of the question.

CONCLUSION.

The judgment of the Court below is erroneous for the reasons hereinabove set forth. The conviction ought to be reversed and set aside. A judgment discharging appellant ought to be directed to be entered by the trial Court. In the alternative, a new trial ought to be ordered in accordance with the opinion to be written in this case.

Dated, San Francisco, California,
July 3, 1953.

Respectfully submitted,
JOHN H. BRILL,
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